

In The United States Court of Appeals

For the Ninth Circuit

SEARS, ROEBUCK & Co., a corporation, *Appellant,*

— vs. —

WILLIAM J. MCALLISTER, as trustee in the matter of
Keith N. Vallier, whose wife is Irene Helen Vallier,
bankrupt, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

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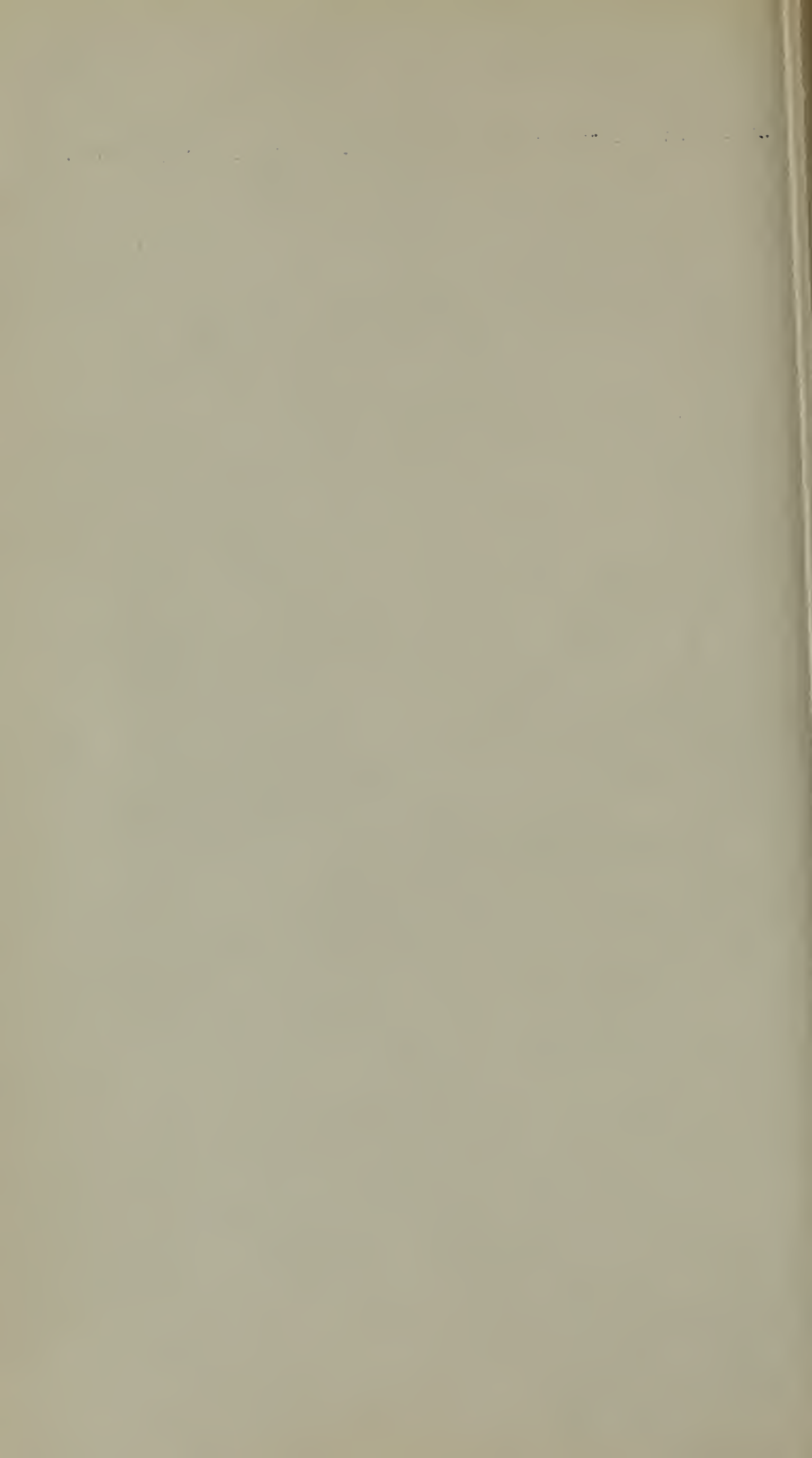
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Appellee.

No. 12461

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

**QUESTION AT ISSUE AND JURISDICTION OF THE
COURT**

This appeal is from an order of the District Court for the Western District of Washington, Northern Division, entered December 13, 1949 (R. 24-6) in a bankruptcy proceeding. The jurisdiction of the District Court rests on the provisions of Chapter 1, Section 1(10) of the United States Code, 1946 Edition, providing that courts of bankruptcy include District Courts of the United States, and the jurisdiction of the United States Court of Appeals for the Ninth Circuit rests upon the provisions of Chapter 4, Section 47(a) of the same code vesting the Circuit Court of Appeals of the United States with appellate jurisdiction over proceedings, either interlocutory or final, from courts of bankruptcy.

The issue raised by this appeal is:

Did the court of bankruptcy err in attempting to deny the vendor's title to property set apart to the bankrupt as exempt under state law?

STATEMENT OF THE CASE

Keith N. Vallier, whose wife is Irene Helen Vallier, was adjudicated a voluntary bankrupt on the 19th day of October, 1948.

Prior thereto, he had purchased under conditional sales contracts from the vendor, Sears, Roebuck and Co. (hereinafter referred to as Sears), household goods and furnishings as follows:

<i>Date</i>	<i>Merchandise</i>	<i>Price</i>	<i>Carrying Charge</i>
Aug. 25, 1941,	Oil Heater.....	\$ 92.65	\$ 6.00
Oct. 31, 1947,	One davenport, two chairs.....	314.02	23.00
Nov. 12, 1947,	One Coldspot refrigerator.....	195.65	15.00
			(R. 13)

Each contract of purchase contained the following clause:

“Until full payment is made, I agree that title to and right of possession of the merchandise shall remain in you,”

signed by the vendee (R. 10).

The bankrupt claimed as exempt under the provisions of the state statute all real and personal property set forth and described in his schedules. The trustee, appellee here, on November 6, 1948, “set apart to be retained by the bankrupt aforesaid as his own property,” the following:

Estimated Value

Property claimed to be exempt by State laws, with reference to the statute creating the exemption:

1. Personal Property:

(a) Household Goods and equipment
Equity interest only Rem. Rev. Stat.,
Sec. 563. Located at 3227 21st Avenue
West, Seattle, Wash. \$250.00

(b) Wearing Apparel - Rem. Rev. Stat.,
Sec. 563 250.00

(R. 3)

On April 29, 1949, the Referee in Bankruptcy filed his order approving the Trustee's Report on Exemptions, expressly holding, (1) "The Bankrupt's claim to exemptions is hereby allowed accordingly" and (2) "The property * * * is hereby set apart to the bankrupt as exempt and ordered delivered to said bankrupt forthwith" (R. 4).

On December 19, 1948, the Referee, pursuant to a petition filed by the Trustee on December 7, 1948, issued an order directed to Sears to appear and show cause

"why title * * * has not fully vested in the estate." and

"why the estate shall not be entitled to receive all monies unpaid on the purchase price from the bankrupt herein." (Petition R. 56; Order, R. 7-8)

In response to this order to show cause, Sears appeared and set up the conditional character of the sales of this merchandise to the bankrupt, that title was at all times reserved in Sears, that the bankrupt

had claimed and had been allowed the property as exempt, and that the property was then and had at all times been in the possession of and used by the bankrupt, and that title thereto had never vested in the bankrupt estate (R. 9-11).

On April 28, 1949, the Referee filed his Memorandum Opinion holding that Sears, having failed to file said conditional sales contracts, as provided by Section 3790, Remington's Revised Statutes of Washington (Laws of 1937, Chapter 196, Sec. 1):

"The vendor's interest * * * passed to, and is now vested in the Trustee in bankruptcy, and he therefore is entitled to collect and receive * * * the balance of payments owing on the contracts."
(R. 14)

On May 13, 1949, the Referee filed his order holding:

"That absolute title to said personal property has vested in the estate herein and is subject to sale and disposal under order of the court herein by the Trustee in bankruptcy," and

"that the estate herein and the Trustee in bankruptcy is entitled to receive from the bankrupt herein the balance due on the purchase price of said personal property * * *." (R. 15-16)

Sears on May 23, 1949, filed its petition in the District Court (Court of Bankruptcy) for review of said order of the Referee (R. 17-20). The District Judge, after several hearings involving discussions of counsel and the submission of briefs and hearing the testimony of the appellee, Trustee in Bankruptcy (R. 32-55), on December 13, 1949, entered his order sustaining the order of the referee:

"in all particulars." (R. 24-26)

ARGUMENT

The appellant bases its appeal squarely upon the following proposition:

Under the law and facts of this case the property in question was held to be exempt to the bankrupt under state law and therefore title to the property in question never vested in the Trustee in Bankruptcy. Therefore the Referee and the District Court were both without jurisdiction to enter the orders in question.

This basic proposition rests squarely upon the following rules of law:

1. Trustee does not take title to exempt property.

“The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this title, *except* insofar as it is to *property* which is *held to be exempt*.”

U. S. Code, 1946 Edition, Title 11, Bankruptcy, Sec. 110.

“This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile.”

U. S. Code, 1946 Edition, Title 11, Bankruptcy, Sec. 24.

(Italics in this brief are appellant's unless otherwise indicated.)

2. Title to property exempted by state law remains in the bankrupt, and must be adjudicated in state courts.

“Title to the property of a bankrupt exempted by state laws remains in the bankrupts, and does not pass to the trustee; and controversies involving *claims upon exempt property must be adjudicated in the state courts. Lockwood v. Exchange Bank*, 190 U.S. 294, 23 S. Ct. 751.”

Van Slyke v. Bumgarner, 177 Wash. 326, 329, 31 P.(2d) 1014.

“State laws control matters of exemption in bankruptcy cases in so far as the right to, and the nature and amount of, an exemption under such laws are concerned. The particular laws which are controlling are those of the state of the bankrupt’s residence or domicile, in force at the time of the filing of the petition, as construed by the highest court of the state.”

8 C.J.S., 1372-3, Sec. 494, Bankruptcy.

“It has very generally been held that, in bankruptcy proceedings, the only question for the court to determine is whether, as against creditors, the bankrupt’s property is exempt. Whether the property is subject to liens or judgments is not the concern of that court, and where such special claims are made, the state court is the proper forum in which to proceed for their enforcement. *In re Vonhee*, 238 Fed. 422, 7 C.J. 363, lays down the rule as follows:

“‘A court of bankruptcy has no jurisdiction to determine the existence or validity of a lien claimed by a creditor upon exempt property, or to enforce against exempt property the rights of creditors whose obligations or evidence of indebtedness contain a waiver of exemption, but

the rights of creditors to subject the same to their debts must be determined in the state courts.'

"To the same effect see the following cases: *In re Grimes*, 96 Fed. 529; *In re Jackson*, 116 Fed. 46; *Lockwood v. Exchange Bank*, 190 U.S. 294; *In re Sydel*, 118 Fed. 407; *McBride v. Gibbs*, 148 Ga. 380, 96 S.E. 1004; *Leslie Paper Co. v. Wheeler*, 23 N.D. 477, 137 N.W. 412, 42 L.R.A. (N.S.) 292, and note."

Lyon v. Herboth, 133 Wash. 15, 20-21, 233 Pac. 24.

3. In Washington conditional sales vendor holds title— is not a secured creditor.

"We have consistently held that, under the statutes of this state no title whatever passes under a conditional sales contract of personal property, and that the relation of debtor and creditor is not created. In *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, L.R.A. (N.S.) 71, it was said that:

" 'It seems inconceivable that the absolute title remains in the seller and at the same time the purchase price be an enforceable debt obligation against the purchaser.'

"And in the following cases we have stated and reiterated that one who takes property under a conditional bill of sale is *not* the owner, and has *no* element of title; *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78, Ann. Cas. 19170 462; *Peterson v. Chess*, 92 Wash. 682, 159 Pac. 894; *Barbour v. Hodge*, 99 Wash. 578, 170 Pac. 115.

"We have, therefore, aligned ourselves against

the decisions of those jurisdictions holding that the title is merely reserved as security, or that the vendee has a qualified property in the title."

Holt Manufacturing Co. v. Jaussaud, 132 Wash. 667, 674, 233 Pac. 35.

"State laws control matters of exemption in bankruptcy cases."

8 C.J.S. 1372, Sec. 493.

See also *In re Miller*, 74 F.(2d) 86; *In re Potter*, 4 F.(2d) 807; *Brown v. Home Life Ins. Co. of New York*, 3 F.(2d) 661; *Ralph v. Cox*, 1 F.(2d) 435; *In re Shepardson*, 28 F.(2d) 353.

4. Bankruptcy court has no jurisdiction to set aside lawful liens against exempt property under state law.

"On a claim of exemption the only question which concerns the court of bankruptcy is whether the debtor is entitled to his exemption as against general creditors; and, if such is the case, the claim cannot be denied because there are some creditors as against whom the claim of exemption could not be sustained."

8 C.J.S. 1378, Sec. 502, Bankruptcy.

See also *In re Vonhee* (D.C. Wash.) 238 Fed. 442; *Lyon v. Herboth*, 133 Wash. 15, 233 Pac. 24.

"A court of bankruptcy has no jurisdiction or authority over the exempt property, except to set it aside to the bankrupt for his use and turn it over to him or to some one duly appointed and constituted to receive it. Such property constitutes no part of the assets of the estate in bankruptcy; and the bankruptcy court has no power to administer it, beyond determining the exemption and setting the property apart. Further-

more, the bankruptcy court may not diminish exempt property by the payment therefrom of costs and expenses. The foregoing rules apply to property exempt under state laws."

8 C.J.S. 1384, Sec. 505, Bankruptcy.

See also *Hukill-Hunter Co. v. Oliver* (C.C.A. Pa.) 43 F.(2d) 100; *Birmingham Finance Co. v. Chisholm* (C.C.A. Ala.) 284 Fed. 840; *In re Duning* (D.C. Pa.) 296 Fed. 243; *Schwanz v. Farmers Co-op. Co. of Lorimor* (Iowa) 214 N.W. 491, 55 A.L.R. 644.

"The trustee has no authority or control over exempt property beyond setting it apart. While he may be entitled to custody or possession for this purpose, his custody is for the bankrupt and does not amount to *custodia legis* rendering the property immune from seizure under the process of a creditor as to whose claim the exemption has been waived."

8 C.J.S. 1384, Sec. 505.

See also *In re Cunningham* (D.C. S.C.) 15 F.(2d) 700; *Clark v. Mirenbaum* (C.C.A. C.A.) 8 F.(2d) 451; *In re Trammell*, 5 F.(2d) 326, Cert. Den.; *Powell v. Anderson*, 46 S. Ct. 349, 270 U.S. 649, 70 L. ed. 780.

"The petitioner asserts that the property cannot be set apart to the respondent as exempt since her homestead declaration was not filed, as required by State Law, until after entry of the petition in bankruptcy.

"Section 70(a) originally provided that the trustee shall be vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt

“‘except in so far as it is to property which is exempt * * *’

“‘property which is held to be exempt * * *.’

“Section 6 of the Bankruptcy Act declares that the provisions of the Act shall not affect the allowance to bankrupts of the exemptions

“‘which are prescribed by the State laws in force at the time of the filing of the petition’

“in the state where the bankrupt has had his domicil. The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, is deemed vested, as of that date, with all the rights and remedies of a creditor then holding a lien on the property by legal or equitable proceedings, whether or not such a creditor actually exists. An adjudication in bankruptcy is not the equivalent of a judicial sale, nor is the trustee given the rights of a purchaser at such a sale.

“The question thus arises whether the respondent’s right of homestead under Nevada law, secured by her filed declaration, prevails against the right and title of the trustee. The court below so held, and we think its judgment was right.

“1. We conclude that the new phraseology in the amendment of § 70 (a) does not alter the principles applicable to the exemption of homestead property in bankruptcy. On the face of the legislation the intent of Congress was merely to clarify the meaning of the section. We are referred to no legislative history indicating that the alteration was intended to work a change of substance. Under the amendment, as under the original provision, a homestead is exempt if, under the state law, it would be held to be exempt.”

145 A.L.R. 498, 499, *Myers v. Matley* (U.S.)
63 Sup. Ct. 780, 87 L. ed. 403-43.

“It is therefore of no concern to the general creditors what disposition a bankrupt makes of exempt property, and a mortgage or transfer thereof cannot be treated as a preference, since *in no event would the trustee be entitled to the property.*”

Baumbaugh v. Los Angeles Morris Plan Co.
(*In re Frank*) (C.C.A. 9) 3 F.(2d) 816.

See also *Gylling v. Kjergaard* (C.C.A. 8) 293 Fed. 676.

Baumbaugh v. Los Angeles Morris Plan Co. (In re Frank) *supra*, was cited and approved recently as follows:

“It is to be borne in mind that our Circuit Court of Appeals has held that the effect of the exemption of property under the state statutes, is that the property does not pass to the trustee and is ‘not subject to administration by the Bankruptcy Act’.”

In re Dudley (C.D.S.D. Calif. Judge Yankwich) 72 F. Supp. 943, 945. Affirmed on appeal (C.C.A. 9) 166 F.(2d) 1023.

5. A setting apart of real estate to a bankrupt as exempt by the Bankruptcy Court does not affect the right of the vendor to forfeit the Executory Contract for failure to pay the purchase price.

“That a vendee in possession of real property under an executory contract to purchase may claim a homestead therein is well settled in this state. *Desmond v. Shotwell*, 142 Wash. 187, 252 Pac. 692; *Perkins v. LaVerne*, 171 Wash. 240, 17 P.(2d) 857; *Hancock Mutual Life Ins. Co. v.*

Wagner, 174 Wash. 185, 24 P.(2d) 420, 27 P. (2d) 1118. The right of homestead, however, does not exist after the right of possession is lost, and the right of possession ceases when the contract is lawfully terminated.

“The homestead right is lost with the loss of the rights of the purchaser under his contract for the purchase of land. It may be lost by a forfeiture of the vendee’s rights under the contract of purchase and ejectment for failure to make the several payments stipulated in the agreement, or where the contract not only has not been complied with, but has been abandoned because of inability to pay the purchase money.”

29 C.J. 845, Sec. 153 (e).

See also, *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429; *Alexander v. Jackson*, 3 Cal. Unrep. Cas. 344, 25 Pac. 415; *Helgebye v. Dammen*, 13 N. Dak. 167, 100 N.W. 245.

Applying these established legal propositions it follows that the bankruptcy court committed the following errors:

SPECIFICATION OF ERRORS

1. In holding that under the facts the property sold by Sears was not exempt to the bankrupt.

(a) Under the Washington statute the bankrupt was entitled to an exemption in household goods and furniture to the value of \$750.00.

Rem. Rev. Stat., Vol. 2, Wash., Section 563, Laws of Wash. 1886 p. 96 gave the bankrupt the following exemptions:

Subdivision 1. “All wearing apparel of every person and family.”

Subdivision 3. In addition to specified bedding "other household goods and utensils and furniture not exceeding \$500.00 coin in value."

Subdivision 4. Specified animals and fowls or if he does not possess or desire to retain such he may "select from his property and retain other property not to exceed \$250.00 coin in value." * * *.

* * * "The purpose of the exemption statutes has long been conceded to be of the beneficent public policy of preventing indigence and encouraging thrift. The broadest interpretation consonant with that policy and with reason and justice should be given such statutes to effectuate their object."

Lemagie v. Acme Stamp Works, 98 Wash. 34, 41, 167 Pac. 60.

See also *Hills v. Joseph*, 229 Fed. 865; *In re Seanson*, 213 Fed. 353; *In re Crook*, 219 Fed. 979; *In re McFarland*, 49 F.(2d) 342 (C.C.A. 9).

"We have consistently held that 'homestead and exemption laws are favored in the law and are to be liberally construed' *State ex rel. White v. Douglas*, 6 Wn.(2d) 356, 107 P.(2d) 593."

In re Poli's Estate, 27 Wn.(2d) 670, 179 P.(2d) 704.

Rem. Rev. Stat. §563, expressly declares:

"The following property shall be exempt from execution and attachment * * * (omitting 14 subdivisions of exempt property enumerated in this section)."

(b) The Court's valuation of the property was unsupported by evidence.

After hearing the testimony of the Trustee (the

only evidence taken by either the Referee or the District Judge) the court indicated his findings of the facts as follows:

“My recollection is that there is about \$421.00 due on just a few items. The reasonable *inference* is that the goods are worth sufficiently above \$421.00, or sufficiently above \$406.00, to make it worth while for the bankrupt to pay that balance. The bankrupt is anxious to pay it. *In the absence of rather convincing evidence*, I must conclude that the property itself is worth more than the amount due. The reasonable *inference* is that the *bankrupt had* the general items of furniture, *including dishes, pots and pans, silverware, and the various other items that allow his family to exist*, and I therefore must conclude that the valuation of all the household goods and furniture, exclusive of the beds and beddings at the time that he went into bankruptcy, and at the present time, exceeded \$500.00—reasonably exceeded \$500.00. To say otherwise would be to say that all the various items had a value of substantially less than \$100.00, other than the items under contract, and I doubt that it is reasonable to infer that the other items, although rather numerous in number, would be of such trivial worth, and yet the bankrupt would be supplementing such trivial items with a few items of substantial value.

“It would seem to me that I would not be justified in finding that the value was less than substantially over \$500.00. The record also would indicate that, because it shows that the equity was of a certain amount, and then there was a balance of some \$400.00. So that equity in all of the goods owned by him, and the value of

these goods actually owned by him, plus the balance, again exceeds \$500.00." (R. 38-9)

The answer to the court is three-fold:

First, he could only *infer* value by *assuming* that the bankrupt had other household property and that he was claiming such other property exempt. The testimony was all to the contrary.

On being questioned by the court the trustee testified:

"Q Have you viewed the premises?

A *No*, I have not.

Q Do you know whether there is any silverware?

A Yes, there is, *I think*, some silverware. As I recall, when I talked to Mr. Dailey, he *told me* that they bought it from an Army Surplus Store, as I recall.

Q Do they have any pots and pans?

A I assume that they do. *I don't know*.

Q How did you arrive at the valuation of \$250.00 as the equity?

A They have paid—the total amount of the property which has been listed by them as having, household goods and so forth, which they bought on conditional sales contract, *they paid that amount*.

Q I realize that, but that merchandise that was bought on conditional contract consisted of an oil heater, one davenport, two chairs, and one Coldspot refrigerator. You do not mean to say that you think that a man and wife are living with nothing but an oil heater and one davenport and two chairs, and one Coldspot refrigerator do you?

A Well, *they have the right*, as I took it, to *select whatever they wanted*. * * *

Q Do you know how many beds they have?

A No, I do not.

Q Or how much bedding? * * * I have not been actually in a position to state, because this thing has been pending so long here. * * *

Q Do you know whether they have had rugs and carpets, a camera, dishes and glassware, and pots and pans?

A I cannot say.

Q You are unable to say?

A That is correct.

Q All right. Now, have you seen these particular items that you have testified about?

A No, I have not seen any items that the people have. * * *."

Questions by MR. LEE:

"Q Are these items, Mr. McAllister, that are set out in the inventory—pardon me—which are in the return that was made to the order to show cause, the oil heater, the davenport, the two chairs, the Coldspot refrigerator, and the radio and the clothing—the possession of those items was allowed to remain in Mr. (5) Vallier, is that right?

A That is right.

Q And to the best of your knowledge, he still has those?

A Yes, sir.

Q And those items never were taken into your possession?

A No, they were not." (R. 33-36)

This testimony shows there was not even a pretense of *appraisement* or valuation. The court as well as the trustee only *guessed* as to valuation — the trustee guessed \$250.00 because he understood the bankrupt had paid that amount on the conditional sales contracts—the court guessed \$500.00 because the total original purchase price exceeded that amount slightly.

Taking the purchase price paid for household goods several years previously as fixing their value at the date of adjudication was, to say the least, quite unrealistic. Perhaps the court had never had experience in selling second-hand furniture.

Secondly, the court ignored the fact that the bankrupt was, under the applicable statute, entitled to an exemption of \$750.00 in value.

Thirdly, it would have made no difference if there had been evidence of the bankrupt having other household goods because the bankrupt *did not claim* such other goods. Under the law a bankrupt can *select* from his property that which he wishes to claim as exempt. The question here is, did the value of the household goods selected (the Sears' merchandise) exceed the sum of \$750.00. We submit that neither the trustee, the referee, nor the court had any evidence upon which to base any such valuation.

(c) Likewise there was no segregation of the so-called equity in this property.

The designation of "equity" by the bankrupt in describing the property claimed as exempt was purely descriptive. The word did not represent value. It signified the character of his title. Equity does not

signify the amount paid. It is qualitative rather than quantitative.

It represented a subsisting interest. Bear in mind the contract was in good standing. It entitled the bankrupt to possess, use and enjoy the property. Until there was a breach and a forfeiture the bankrupt had a right to retain the property.

While the bankruptcy court had a right to appraise and set apart the bankrupt's exempt property (*In re Lynch*, 101 Fed. 579) and to order a sale, where necessary to effectuate the setting apart (*In re Osborn*, 104 Fed. 780), it is never done unless:

“the exempt property is *not segregated* or *capable* of being readily set apart from other property, and it might be said, is *indivisible* except through some appropriate process of the court.”

Bank of Nez Perce v. Pindel (C.C.A. 9) 197 Fed. 917.

In the instant case, these articles of household goods could easily have been segregated or divided had the exemption value rendered same necessary. On the contrary, it was recognized that the bankrupt was entitled to their possession, use and enjoyment, and accordingly they were left in his possession at all times. Since the value was clearly less than \$750.00 there was no necessity to segregate or sell.

The respective rights of the bankrupt and his vendor, both as to the payment of the balance of the purchase price or any attempt at forfeiture in the event of a future default in payment, were not matters of concern to the bankruptcy court, but should have been

left to decision by the state courts under applicable state laws.

That a segregation or divison of the property was not indicated is made clear by the action of the trustee and referee in setting the entire Sears' merchandise apart to the bankrupt, leaving it in his *sole* possession and use *to this day*.

2. The bankruptcy court exceeded its jurisdiction.

The bankruptcy court, overlooking fundamental principles and rules, then undertook to adjudicate the title as between the bankrupt and his vendor.

Instead of limiting its inquiry to the *appraisement* of the property claimed as exempt, and allowing an exemption within the value fixed by the statute, the bankruptcy court, *assuming* a value beyond the statutory limit, orders all of the property set apart to the bankrupt and seeks to impound into the bankrupt estate the amount unpaid on the purchase price.

This was beyond the jurisdiction of the court and violative of all authorities, both federal and state, cited under sub-divisions 2 and 4 above (pp. 6, 8).

The referee's order recited that

“the sale by the said respondent to the said bankrupt was and is an absolute sale and that the absolute title to said property has vested in the estate herein.” (R. 16)

No court of bankruptcy has ever been given the power to *adjudicate* title to *exempt property*. The holding of the referee “sustained in all particulars” by the order of the bankruptcy court (R. 25) was wholly void. It is based upon a misconstruction of the

law. Remington's Revised Statutes of Washington, Section 3790, Laws of 1937, Chapter 196, Section 1, reading as follows:

"That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all *bona fide* purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions, including the rate of interest and the purchase price exclusive of interest, insurance and all other charges, and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." * * *

does not make the sale absolute as *between the original parties*.

"We have consistently held that, under the statutes of this state, no title whatever passes under a conditional sales contract of personal property, and that the relation of debtor and creditor is not created. In *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L.R.A. (N.S.) 71, it was said:

" 'It seems inconceivable that the absolute title remains in the seller and at the same time the purchase price be an enforceable debt obligation against the purchaser.'

"And in the following cases we have stated and reiterated that one who takes property under a conditional bill of sale is not the owner,

and has no element of title: *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78, Ann. Cas. 1917D 462; *Peterson v. Chess*, 92 Wash. 682, 159 Pac. 894; *Barbour v. Hodge*, 99 Wash. 578, 170 Pac. 115.

“We have, therefore, aligned ourselves against the decisions of those jurisdictions holding that the title is merely reserved as security, or that the vendee has a qualified property in the title.”

Holt Manufacturing Co. v. Jaussard, 132 Wash. 667, 674, 233 Pac. 35.

Both the referee and the court erred in holding that all Sears had was a “security interest.” Sears had title, was not a creditor and has never claimed to be a creditor of the bankrupt. In fact, so long as the bankrupt continued to pay the contract price he was not a debtor and Sears was not a creditor.

Hafer v. Spaeth, 22 Wn.(2d) 378, 156 P. (2d) 408.

3. The bankruptcy court is without power to impound future earnings of the bankrupt.

The order of the referee, sustained in all particulars by the court, further ordered that

“the trustee in bankruptcy is entitled to receive from the bankrupt herein the balance due on the purchase price of said personal property.” (R. 16, 25)

“The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors.”

Local Loan Co. v. Hunt, 93 A.L.R. 195, 200, 292 U.S. 234, 78 L. ed. 1230, 54 S. Ct. 695.

“The date of the filing of the bankruptcy petition is the point of time as of which the right to exemptions is to be determined.”

8 C.J.S. 1378, Bankruptcy, Sec. 502.

See also *White v. Stump* (Idaho) 45 S. Ct. 103, 266 U.S. 310, 69 L. ed. 301; *In re Trammell* (D.C. Ga.) 5 F.(2d) 326; *Clark v. Nirenbaum*, 8 F.(2d) 451.

Under Washington law a contract of conditional sale not filed is good as between the parties.

See *In re Gunning*, 39 F. Supp. 706, Suppl. Op. 38 F. Supp. 500, affirmed 124 F.(2d) 7.

With one hand to extend the right of possession, use and enjoyment of the property as exempt, and with the other hand to demand that the bankrupt pay the unpaid purchase price into the bankrupt estate, would be contrary to the very spirit and purpose of the exemption.

“Purpose; public policy. The exemption laws are founded on public policy. Some authorities regard the allowance of the exemption as being for the benefit of the debtor, while others regard it as in the nature of a police regulation primarily for the benefit of the community; in any event, the purpose underlying exemption legislation is the securing to the unfortunate debtor of the means to support himself and his family, the protection of the family being the main consideration.”

35 C.J.S. 8, Exemptions.

Futhermore, to take such action in the absence of and without giving to the bankrupt an opportunity to be heard, would seem to be wholly unwarranted.

4. The orders in question deprive the vendor of his contract rights.

It is obvious that for the bankruptcy court to order the bankrupt to pay the unpaid balance into the bankrupt estate not only created a burden on the bankrupt but was *intended* to prevent Sears from collecting the balance of the purchase price of its merchandise.

However, it is too well established for argument that any dispute as to respective rights of the vendor and the bankrupt are matters solely within the jurisdiction of the state courts. See *Lockwood v. Exchange Bank*, 190 U.S. 294, 23 S. Ct. 751; *In re Vonhee*, 238 Fed. 422; *Van Slyke v. Bumgarner*, 177 Wash. 326, 329, 31 P.(2d) 1014.

Necessity and Purpose of This Appeal

The amount involved in this action would not seem to warrant the time or expense involved in this appeal if it were not for the evident purpose of the referee and the court to set a precedent intended to *force* vendors under conditional sales contracts to file such contracts in order to retain the vendor's contract interest where the property sold is within the exemptions to which the vendee bankrupt is entitled under state law and the property has been set apart to the bankrupt as exempt.

Such action is entitled to neither the sanction of law nor of good morals.

The appellant is entitled to a reversal of the order appealed from and a dismissal of the action.

Respectfully submitted,

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